

**ST 02-28**

**Tax Type: Sales Tax**

**Issue: Sales v. Resale Issues**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPRINGFIELD, ILLINOIS**

---

<b>THE DEPARTMENT OF REVENUE</b>	)	
<b>OF THE STATE OF ILLINOIS</b>	)	
	)	<b>Docket No. 01-ST-0000</b>
<b>v.</b>	)	<b>IBT # 0000-0000</b>
	)	<b>NTL #00-0000000000000000</b>
<b>ABC FOODS &amp; PRODUCE, LTD.</b>	)	
	)	
<b>Taxpayer</b>	)	

---

**RECOMMENDATION FOR DISPOSITION**

Appearances: Kent Steinkamp, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Brenda S. LeChien and Mark J. Stegman of Mathis, Marifian, Richter & Grandy, Ltd. for ABC Foods & Produce, Ltd.

Synopsis:

The Department of Revenue (“Department”) audited ABC Foods & Produce, Ltd. (“taxpayer”) for the period of July 1, 1997 through December 31, 1999. At the conclusion of the audit, the Department issued a Notice of Tax Liability to the taxpayer for additional retailers’ occupation tax (“ROT”). The taxpayer timely protested the Notice. An evidentiary hearing was held during which the sole issue raised by the taxpayer was whether certain sales to its customers were exempt from taxation on the basis that they were sales for resale. After reviewing the record, it is recommended that this matter be resolved in favor of the taxpayer.

FINDINGS OF FACT:

1. The taxpayer is in the business of selling food products and paper goods to the amusement industry. (Stip. #1; Tr. p. 29)

2. The Department conducted an audit of the taxpayer's business for the period of July 1, 1997 through December 31, 1999. (Stip. #2)

3. At the conclusion of the audit, the Department determined that the taxpayer owed additional ROT on items that it had sold. The Department grouped the taxpayer's items into one of two categories: (1) unprepared food items, which are taxed at the low rate of one percent, and (2) prepared food and paper goods, which are taxed at six and a quarter percent. (Tr. p. 10; Dept. Ex. #4)

4. For the unprepared food items, the Department determined that the taxpayer owed additional tax of \$4,962. (Dept. Ex. #4, 8)

5. For the prepared food and paper goods, the Department determined that the taxpayer owed additional tax of \$8,742. (Dept. Ex. #4, 7)

6. All of the ROT claimed to be due from the taxpayer resulted from the auditor's denial of the resale exemption for sales where the taxpayer received certificates of resale or claims for resale. Each certificate contained a purported resale number and each claim was based on a purported resale number that was provided to the taxpayer by the customer. (Stip. #6)

7. The purported resale number provided by each customer to the taxpayer on the certificates of resale or in support of the claims for resale was a collection internal Illinois Business Tax number used by the Department. (Stip. #9)

8. During the audit, the Department accepted the taxpayer's certificates or claims in order to exempt from ROT the sales made to customers who resold the items at the Illinois and DuQuoin State Fairs. (Stip. #8)

9. The taxpayer's customers who were vendors at fairs other than the Illinois and DuQuoin State Fairs are the customers for which the Department denied the resale exemption. (Tr. p. 48)

10. The customers who were vendors at fairs other than the Illinois and DuQuoin State Fairs are the same customers who resold the taxpayer's items at the Illinois and DuQuoin State Fairs. In other words, all of the taxpayer's customers sell items at fairs throughout the State of Illinois. The Department denied the exemption based on different events rather than different customers. (Tr. pp. 47-48)

11. The taxpayer presented three certificates of resale that were from three of its customers. For each of these customers, the Department denied the taxpayer the resale exemption. All three certificates have the same registration certificate number. (Taxpayer Ex. #1, 2, 3)

12. The Department issued a Notice of Tax Liability to the taxpayer that showed additional tax due of \$13,704 for the period of July 1, 1997 through December 31, 1999. A copy of the Notice was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #1)

#### CONCLUSIONS OF LAW:

The Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*) imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2. The term "sale at retail" is defined as "any transfer of the ownership of or title to tangible

personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale \* \* \*.” 35 ILCS 120/1. Section 2c of the ROTA requires purchasers who are not registered with the Department but who are resellers of tangible personal property to apply to the Department for a resale number. This section further provides as follows:

“Except as provided hereinabove in this Section, a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale.

Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. **This presumption may be rebutted by other evidence that all of the seller’s sales are sale [sic] for resale, or that a particular sale is a sale for resale.**” Emphasis added, 35 ILCS 120/2c.

Sections 4 and 5 of the ROTA provide that the certified copy of the corrected return issued by the Department "shall be prima facie proof of the correctness of the amount of tax due, as shown therein." 35 ILCS 105/12; 120/4; 120/5. Once the Department has established its *prima facie* case by submitting the corrected return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. A.R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 832 (1st Dist. 1988). To prove its case, a taxpayer must present more than its testimony denying the accuracy of the Department's assessment. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, 217 (1st Dist. 1991). The taxpayer must present sufficient documentary evidence to support its claim. Id.

The taxpayer argues that the Department has inconsistently applied the exemption provision. The Department allowed the exemption for sales to customers who resold the items at the Illinois and DuQuoin State Fairs, but not for sales to the same customers who resold items at other fairs. The taxpayer contends that the exemption should not depend on the fair at which the

taxpayer's customers sold the products; it should depend on the information provided by the customer. The taxpayer claims that it collected sufficient information from its customers to allow the exemption. The taxpayer states that it received either a certificate of resale or a claim for resale based on the Department's internal collection number, which the taxpayer believed was the customer's registration/resale number. The taxpayer argues that because the auditor accepted this information to exempt sales of items that were resold at the Illinois and DuQuoin State Fairs, the information should be sufficient for the other sales as well.

Alternatively, the taxpayer argues that other evidence that was presented supports a finding that all of the customers' sales were sales for resale. The taxpayer's president, Ron Doe, testified that the taxpayer is a wholesaler, and Mr. Doe saw the taxpayer's customers selling his products at fairs during the audit period. The taxpayer contends that this testimony and the nature of the products sold support the finding that the disputed transactions were indeed sales for resale.

The Department contends that its position is not inconsistent. The Department states that the auditor must first determine whether a valid resale certificate exists, and if none exists, then the auditor must determine whether the taxpayer is likely to overcome the presumption created by its absence. For only the Illinois and DuQuoin State Fair sales, the Department contends that the taxpayer was likely to overcome this presumption. The Department concedes that the taxpayer's customers were assessed ROT at the Illinois and DuQuoin State Fairs and other events where they do business. (Dept. brief p. 1) The Department contends that it is reasonable to conclude that if regular collections from vendors are made at the state fairs, then the taxpayer might overcome the presumption *for those sales*.<sup>1</sup> (Dept. brief p. 5) If there is less convincing

---

<sup>1</sup> Although the Department has referred to collections **from** vendors, the argument seems to be referring to collections **by** vendors from the purchasers.

evidence that collections were made for all sales at all the other events, then it would be unlikely that the taxpayer could overcome the presumption created by the lack of valid certificates. (Dept. brief pp. 5-6)

Because there were “practices in place at the Illinois and DuQuoin State Fairs to regularly assess and collect ROT from vendors,” the Department determined that these sales were exempt from taxation. (Dept. brief p. 4) The Department states that it does not concede that ROT collections at all events were pursued as regularly and assiduously as they were at the Illinois and DuQuoin State Fairs. (Dept. brief p. 6) The Department concedes that collections have been made at other events, but not necessarily at all other events. Id. The Department contends that the evidence in the record was insufficient to find that the ROT collections at the other events were the same as at the Illinois and DuQuoin State Fairs. The Department, therefore, argues that it was reasonable for the auditor to divide the sales between those items that were sold at the state fairs and those sold at other fairs.

The stipulations do not clearly indicate the reason why the Department granted the exemption for sales of items sold at the Illinois and DuQuoin State Fairs. The only reference in the stipulations to these specific sales is in stipulation number eight, which provides as follows:

During the audit, the Department accepted such certificates of resale or claims of resale to exempt from Retailers’ Occupation Tax sales made by the Taxpayer during the audit period to customers for items to be resold by the customers at the Illinois State Fair and the DuQuoin State Fair.

According to the Department’s brief, the auditor granted the exemption for these sales based on the “comprehensiveness of the ROT collections” at those events. (Dept. brief, p. 6) The record does not indicate that this was the basis of the auditor’s conclusions. The only references to the Illinois and DuQuoin State Fairs during the hearing were made by Mr. Doe. He stated that the auditor considered the Department’s internal number to be a valid resale number at the Illinois

and DuQuoin State Fairs. (Tr. pp. 33-34) The Department's counsel later asked Mr. Doe, "[The auditor] basically accepted your argument about the Illinois State Fair and the DuQuoin State Fair during that audit; is that correct?" Mr. Doe responded, "That's correct." (Tr. p. 47) Although the auditor had previously testified that he denied the exemption because there was either no certificate of resale or an incomplete certificate of resale (Tr. p. 16), the auditor did not give a reason for the distinction between the sales of products sold at the state fairs and the sales of products sold at other fairs.

As the statute quoted previously indicates, a sale shall be considered to be a tax-free sale for resale if the purchaser has an active registration number or resale number and furnishes that number to the seller in connection with certifying that the sale is for resale. 35 ILCS 120/2c. The failure to present an active registration number or resale number **and** a certification that the sale is for resale creates a presumption that it is not for resale. Id. This presumption may be rebutted by other evidence that the sales are for resale. Id.

The parties have stipulated that the purported resale number provided by each customer for whom the exemption was denied was not an active resale number. The number was an internal collection number used by the Department.<sup>2</sup> (Stip. #9) The taxpayer's customers have used this number for approximately 40 years, and no one knows how it was obtained. Although the taxpayer may have in good faith accepted this number as a resale number, the statute requires an active number plus certification that the sale is for resale in order for the exemption to be automatically granted. A good faith belief that the number is valid does not make it valid.

---

<sup>2</sup> The vendors who purchased items from the taxpayer are itinerant vendors, and the Department apparently collects the tax from these vendors at the fairs and assigns them this number in order to keep track of these taxpayers when the tax is collected. (Tr. p. 21) It is a number used by the collection division in order to process money collected at special events. (Tr. pp. 21-22)

Because the taxpayer did not have an active resale number for its customers, this created a presumption that the sales were not for resale.

The critical question then is whether the evidence supports a finding that the sales were actually sales for resale. As previously stated, the record does not indicate why the Department made a distinction between the sales of products sold at the state fairs and the sales of products sold at the other fairs. The Department has explained in its brief that this distinction was based on the comprehensive collection efforts made by the vendors at the state fairs. This focus, however, is not relevant. Although the collection efforts are certainly a matter of importance to the Department, they are not a concern in determining whether a sale is for resale. Whether a vendor collected use tax on a sale is a separate question from whether a vendor purchased an item that was then resold. The statute simply requires the sale to be for resale; it does not require a comprehensive effort on the part of the vendor to collect use tax and remit ROT in order for the sale to be tax-free.

By allowing the exemption for sales of items that were sold at the state fairs, the Department has admitted that these customers are resellers. These customers are the same customers who purchased the items that were sold at the other fairs. (Tr. pp. 47-48) All of the elements of the exemption have been met: the customers are resellers who resold the items at the other fairs. This is all that is necessary to qualify for the exemption.

Recommendation:

For the foregoing reasons, it is recommended that the taxpayer's sales be exempt from taxation on the basis that they are sales for resale.

---

Linda Olivero  
Administrative Law Judge

Enter: September 19, 2002